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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/600,711	06/23/2003	Baychar	BAY-710-02	5750
7590	01/31/2005		EXAMINER	
MATTINGLY, STANGER & MALUR, P.C. ATTORNEYS AT LAW SUITE 370 1800 DIAGONAL ROAD ALEXANDRIA, VA 22314			MATZEK, MATTHEW D	
		ART UNIT	PAPER NUMBER	1771
DATE MAILED: 01/31/2005				

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)
	10/600,711 Examiner Matthew D. Matzek	BAYCHAR, Art Unit 1771

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) Responsive to communication(s) filed on 23 June 2003.
- 2a) This action is FINAL. 2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) Claim(s) 1-26 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) Claim(s) _____ is/are allowed.
- 6) Claim(s) 1-26 is/are rejected.
- 7) Claim(s) _____ is/are objected to.
- 8) Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on _____ is/are: a) accepted or b) objected to by the Examiner.
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) All b) Some * c) None of:
 1. Certified copies of the priority documents have been received.
 2. Certified copies of the priority documents have been received in Application No. _____.
 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date: _____ |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date <u>ALL</u> | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

1. Claims 1, 3, 7, 8, 11, and 12 are rejected under 35 U.S.C. 102(b) as anticipated by Lumb et al. (US Patent 5,126,182).
2. Lumb et al. disclose a water vapor permeable, wind and water resistant composite fabric including a fabric substrate, a layer of a foamed water vapor porous adhesive, and a layer of fabric material for exposed use (Abstract). The fabric material is preferably a layer of flocked fibers (Abstract). An adhesive barrier material is placed between the foamed adhesive and substrate layers (Abstract). This barrier layer may be substantially removed during later processing (Abstract). The adhesive barrier is breathable (col. 3, lines 35-38). The foamed adhesive layer is water vapor permeable allowing the article to be breathable (col. 4, lines 15-25). The Examiner takes the position that the foam is necessarily open-celled in as it is breathable and water vapor permeable. The flock fibers are formed of nylon, cotton, rayon, acrylic, polyester, wool, or a combination thereof (col. 5, lines 7-12). The fabric substrate is a knit fabric suitable for apparel. The fabric substrate may be formed from a natural or synthetic fiber or blend of polyester, acrylic, wool, cotton, nylon, etc. (col. 3, lines 3-12). The Examiner takes the position that the fabric substrate operates as a moisture transfer material due to its compositional make up.

Claim Rejections - 35 USC § 102/103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

3. Claims 25 and 26 are rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Lumb et al. (US Patent 5,126,182). The invention of Lumb et al. has been previously disclosed.
4. The article of Lumb et al. comprises open-cell foam and as such it possesses reversible enhanced thermal properties. Any foamed material is a good heat insulator by virtue of the low conductivity of the gas, in this case air, contained within the foam (Principles of Polymer Systems p. 362).

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

5. Claims 15, 17-18, and 20 are rejected under 35 U.S.C. 103(a) as obvious over Norton et al. (US Patent Application Publication 2002/0012784) in view of Litchfield et al. (US Patent 6,237,251).

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6. Norton et al. teach a multi-layer composite footwear upper comprising a first layer of thermoplastic foam, a second layer of thermoplastic urethane, preferably in the form of a film and a third layer of mesh set in between the two thermoplastic layers (Abstract). The mesh cloth material may be formed from felt, wool, fur, hair, polyester, nylon, cotton, acetate, or acrylic (col. 2, lines 4-6). Claim 17 is rejected as the presence of process limitations on the product claims, in which the product does not otherwise patentably distinguish over prior art cannot impart patentability to the product. *In re Stephens*, 145 USPQ 656. The applied patent states that disclosed invention is not limited to the three layer laminate and any number of layers can be used depending upon the desired properties of the final product (col. 4, lines 23-26). The Examiner takes that position that additional layers of thermoplastic (cellular) foam and urethane film added to the original layers in combination with a layer of mesh acting as an inner moisture transfer material is provided for by the applied invention. Another possible embodiment would be to have and two layers of foam positioned adjacent to one another providing a foam layer adjacent to a cellular elastomeric. The applied patent also provides for a sock or exterior shell material for the composite (col. 6, lines 23-26). The applied patent is silent as to the nature of the thermoplastic foam (open or closed cell).

7. Litchfield et al. disclose a shoe with a foot conforming support member. This support member comprises a conventional open-celled cushioning foam (col. 6, lines 1-5). It would have been obvious to one of ordinary skill in the art at the time of the invention to have made the invention of Norton et al. with the open-celled foam of Litchfield et al. motivated by the desire to make the foam cushioning.

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8. Claims 19, 21, and 23-24 are rejected under 35 U.S.C. 103(a) as obvious over Norton et al. in view of Tucker et al. (US Patent 5,970,629). The invention of Norton et al. allows for the degree water resistance to be varied by changing, adding, removing or moving layers of the composite sheet (col. 4, lines 25-32).

9. Tucker et al. teach a water-repellant or water-proof, breathable material for use as a footwear composite liner (Abstract). The liner is water-repellant or water-proof due to the use of water-repellant or water-proof fabrics, such as a Gore-Tex® laminate. Said fabrics are stitched together with a laminate designed for the area of the instep to maintain the waterproof character of the liner (col. 5, lines 2-15).

10. It would have been obvious to one of ordinary skill in the art at the time of the invention to have made the invention of Norton et al. with the waterproof materials of Tucker et al. The skilled artisan would have been motivated by the desire to waterproof said liner to improve the comfort of the wearer and reduce the ability for microbial or fungal growth within the liner.

11. Claims 2, 4-6, 9, 10, 16, and 22 are rejected under 35 U.S.C. 103(a) as obvious over Norton et al. in view of Rock et al. (US Patent 6,602,811). The invention of Norton et al. has been previously disclosed and is silent with regard to the use of silver fibers.

12. Rock et al. teach a composite textile for removing moisture from the skin (Abstract). The invention of Rock et al. comprises two layers of fabric, the first to facilitate the transfer of moisture from the surface of the skin and the second layer is blended with synthetic fibers treated to have antimicrobial properties (Abstract). The fibers of the applied invention have been treated with silver metal to inhibit bacterial growth and prevent body odor (col. 5, lines 30-35 and 58-61). It would have been obvious to one of ordinary skill in the art at the time of the invention to

have made the invention of Norton et al. with the silver fibers of Rock et al. The skilled artisan would have been motivated by the desire to inhibit bacterial growth and prevent body odor within the footwear liner.

Claim Rejections - 35 USC § 102

13. Claim 3 is rejected under 35 U.S.C. 102(b) as being anticipated by Sagel et al. (US Patent 4,482,593).
14. Sagel et al. disclose a composite comprising flock fibers, a hydrophilic flocking adhesive, a thin nonwoven backing substrate, and an open-cell foam secondary backing (Abstract and col. 2, lines 23-30). The hydrophilic flocking adhesive allows for the transference of wet soils from the surface to the backing layers making it breathable (col. 3, lines 1-15).

Claim Rejections - 35 USC § 103

15. Claim 14 is rejected under 35 U.S.C. 103(a) as obvious over Kinlaw et al. (US Patent 5,035,943) in view of Rock et al. The invention of Rock et al. has been previously disclosed.
16. Kinlaw et al. teach a non-woven fabric that is coated with open-cell foam provided with good barrier properties to bacteria (Abstract and col. 1, lines 65-68). The applied invention is directed for use as breathable pillow covering, but does not teach the use of silver fibers.
17. It would have been obvious to one of ordinary skill in the art at the time of the invention to have made the invention of Kinlaw et al. with the silver fibers of Rock et al. The skilled artisan would have been motivated by the successful creation of a bacterially resistant pillow cover.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Matthew D. Matzek whose telephone number is (571) 272-2423. The examiner can normally be reached on 8:30 am - 5:00 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Terrel Morris can be reached on (571) 272-1478. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

mdm



ELIZABETH M. COLE
PRIMARY EXAMINER